Janice F. Willis v. U.S. General Accounting Office and U.S. General Accounting Office Personnel Appeals Board

Docket No. 98-02

Date of Decision: October 8, 1999

Cite as: Willis v. GAO and GAOPAB (10/8/99)

Before: Paul G. Streb, Chief Administrative Law Judge, Merit Systems Protection Board (sitting in place of the Personnel Appeals Board)

Reprisal

Discipline

Whistleblowing

Removal

DECISION

Petitioner has filed a petition for review of her removal, contending it constitutes a prohibited personnel practice. For the reasons stated below, I SUSTAIN Petitioner's removal.

BACKGROUND

Petitioner was employed as a Senior Trial Attorney, GS-15, at the Personnel Appeals Board (Board or PAB) of the General Accounting Office (GAO). Her supervisor was Jessie James, Jr., General Counsel of PAB. Petitioner's duties included investigating charges filed with the General Counsel's office, preparing reports and recommendations concerning them, and representing employees in proceedings before PAB. On January 14, 1997, Mr. James issued Petitioner a notice of proposed removal (proposal notice). The proposal was based on three incidents of alleged insubordination and a prior disciplinary record consisting of a suspension and a reprimand, both for insubordination. Ex. PAB-1, Tab 1. On February 24, 1997, Petitioner submitted a seven-page response to the proposal; she argued it constituted reprisal for whistleblowing, but she did not deny any of the allegations. *Id.,* Tab 5. On March 25, 1997, Leroy Clark, Chair of PAB, issued a decision to remove Petitioner, effective that day. *Id.,*Tab 9.

On April 24, 1997, Petitioner filed a charge with PAB alleging her removal was effected in reprisal for whistleblowing. Ex. P-9, Tab 10. Pursuant to 4 C.F.R. §28.17(b), an attorney in private practice was appointed as Acting General Counsel of PAB for purposes of investigating the charge and preparing a report and recommendation concerning it. *Id.,* Tabs 10, 11. On July

15, 1998, that attorney issued a confidential report and recommendation and advised Petitioner of her right to file a petition for review with the Board. *Id.*, Tab 11.

On August 20, 1998, Petitioner filed a petition for review with the Board. Case File, Tab 1. Pursuant to 4 C.F.R. § 28.17(c), the Board entered into an agreement with the Merit Systems Protection Board (MSPB) to provide a judge to adjudicate the matter, and MSPB assigned the case to me on September 1, 1998. *Id.,* Tabs 1, 2.

In her petition for review, Petitioner contended her removal, as well as nine additional actions, had been effected in reprisal for whistleblowing. *Id.,* Tab 1. On November 16, 1998, I dismissed the petition for review as it concerned those nine additional actions because it was untimely filed regarding them, and because Petitioner was barred by the doctrine of collateral estoppel from relitigating four of them. *Id.*, Tab 17.

A hearing was conducted on May 3-6, 1999. During the hearing, I granted PAB's unopposed motion for a finding that it had met the three criteria set forth in *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 338-40 (1981),[1] regarding Petitioner's past disciplinary record, and that, therefore, my review of her suspension and reprimand would be limited to determining whether those actions were clearly erroneous.[2] Hearing Transcript (Tr.) 121-24; see Case File, Tabs 56, 57.

ANALYSIS

Petitioner's appeal was timely filed and is within the Board's jurisdiction. PAB has the burden to prove by a preponderance of the evidence that the charge is sustained, that disciplinary action

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[1] The Board is not bound by MSPB precedent. However, the U.S. Court of Appeals for the District of Columbia Circuit has pointed out that the Board carries out functions comparable to those of the MSPB, and it has indicated that PAB should consider MSPB precedent in deciding questions already decided by that agency. See *General Accounting Office v. GAO Personnel Appeals Board*, 698 F.2d 516, 518, 535 (D.C. Cir. 1983). For these reasons, I find that MSPB precedent is relevant here.

[2] Generally, an employee's prior disciplinary record may be considered in determining whether an enhanced penalty for the current charges against the employee is warranted. See*, e.g., Huettner v. Department of the Army*, 54 M.S.P.R. 472, 475 (1992). Moreover, when three criteria have been met, review of a prior disciplinary action is limited to determining whether that action is clearly erroneous. *E.g., Bolling*, 9 M.S.P.R. at 338-40 (1981). The three criteria that must be met if the scope of review of the prior action is to be limited in this manner are the following: (1) the employee was informed of the action in writing; (2) the action is a matter of record; and (3) the employee was permitted to dispute the charges before a level of authority higher than the one that imposed the discipline. *Id.* Unless all three *Bolling* criteria are met, the prior disciplinary action is subject to a *de novo* review. *See Parsons v. Department of the Air Force*, 21 M.S.P.R. 438, 442-43 (1984).

promotes the efficiency of the federal service, and that the penalty of removal is appropriate. *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 302 (1981); 4 C.F.R. §28.61(a)(2).

Petitioner's removal was based on her alleged insubordination in refusing to complete work assignments in the Hatcher and Carter cases and to revise the PAB Guide to Practice. The charge is sustained in all respects.

Insubordination is defined as a willful and intentional refusal to obey an authorized order of a superior officer that the officer is entitled to have obeyed. *Webster v. Department of the Army,* 911 F.2d 679, 684 (Fed. Cir. 1990), *cert. denied,* 502 U.S. 861 (1991); *Fleckenstein v. Department of the Army,* 63 M.S.P.R. 470, 473 (1994).

Hatcher Case

On December 11, 1996, Mr. James gave Petitioner a memo to confirm previous conversations in which he had informed her that her work performance was unacceptable. Ex. PAB 1, Tab 6 at 47. In the memo, Mr. James gave Petitioner an opportunity to demonstrate acceptable performance by completing assignments in several of her pending cases. He instructed her, *inter alia,* to submit a memo by December 31, 1996, determining whether the office had jurisdiction in the Hatcher case and discussing the facts and laws relevant to that issue. *Id.* at 50. According to Mr. James's undisputed testimony, this was a simple assignment that should have taken one day to complete. Tr. 85. However, as of December 31, Petitioner had not submitted a memo, asked for an extension, or given Mr. James any reason why she had not completed the assignment. Tr. 62.

On January 9, 1997, Mr. James initiated a counseling session with Petitioner and asked her about the assignment. According to Mr. James, she told him she was aware of the due date, but she had not done any work on the assignment and said she would do it when she "got around to it." Tr. 64; Ex. P-57. Petitioner denied stating she would do the assignment when she "got around to it." Tr. 678. However, I find Mr. James's testimony on that issue to be more credible. Unlike Petitioner's testimony, his testimony is supported by a memo he wrote on February 10, 1997, to Mr. Clark stating that Petitioner made the statement in question. Although Petitioner asserts that the memo contains the contradictory statement that, "Jan continues to indicate that she does plan to complete the work," Tr. 679; Ex. P-57, I find no inconsistency between that statement and the statement that she would do the assignment when she "got around to it." Moreover, the proposal notice alleges Petitioner made that statement, and she did not deny making it in her response to that notice. Consequently, Petitioner's testimony is inconsistent with her silence when first presented with an opportunity to deny the allegation that she made the statement. See *Adams v. Department of Transportation,* 735 F.2d 488, 492 (Fed. Cir.), *cert. denied sub nom. Schapansky v. Department of Transportation,* 469 U.S. 1018 (1984) (inference can be drawn that allegations in proposal notice that are not denied in response are true).

Petitioner testified that Mr. James prevented her from doing her work by not allowing her to work overtime or on weekends, keeping case files locked up unless she specifically asked for them, refusing to give her extensions of time, and failing to keep her informed of pertinent

matters. Tr. 642, 659, 662, 678. Petitioner's testimony that Mr. James did not give her extensions of time is not credible because it is contradicted by her deposition.[3] Ex. PAB 4 at 38. Moreover, Petitioner did not mention the Hatcher case or any of the other assignments at issue in the charges in conjunction with this testimony. Thus, she did not connect this general testimony to the Hatcher case or the other pertinent assignments by explaining specifically how she was prevented from completing them by the matters described in her testimony. Perhaps more important, Petitioner's testimony lacks credibility because, as noted above, her response to the proposal notice did not deny, or even address, any of the allegations of insubordination in that notice. Ex. PAB-1, Tab 5; Tr. 329; See *Adams,* 735 F.2d at 492.

In her closing argument, Case File, Tab 60, Petitioner contends she had "answered the jurisdictional questions in memoranda to Mr. James on November 14 and November 15, 1996." This argument lacks merit. First, in view of Petitioner's failure to deny any of the allegations concerning this specification in her response to the proposal notice, I draw an inference that those allegations are true. See *Adams,* 735 F.2d at 492. Also, this contention is inconsistent with Petitioner's admission in her deposition that, as of November 15 and December 11, she had not completed her assignment to determine whether there was jurisdiction in the case. Ex. PAB-4 at 12-13.

Moreover, as stated above, Mr. James instructed Petitioner on December 11, 1996, to submit the jurisdictional memo by December 31. Petitioner's assertion that she believed she had already given him such a memo is not credible in light of her subsequent acts and omissions. Petitioner offered no evidence that she informed Mr. James after she received his December 11 memo that she had already completed the assignment. Petitioner's alleged belief that she had already completed the assignment is also inconsistent with her January 9, 1997, admission to Mr. James that she had not done any work on the assignment, and with her failure to dispute the allegation in her response to the proposal notice. Furthermore, the memos offered by Petitioner as evidence that she had informed Mr. James of the answer to the jurisdictional questions on November 14 and 15, 1996, do not show that she did so. Ex. P-92; Tr. 295-303. In fact, Petitioner informed Mr. James in one of those memos, dated November 15, that she "had not come to a firm conclusion" on that issue. Ex. P-92(i). Another of those memos shows she did not inform Mr. James of her conclusion regarding jurisdiction until March 7, 1997, which was well after he had issued the proposal to remove her. Ex. P-92(k); Tr. 314.

Petitioner argues further that Mr. James modified her assignment to submit the jurisdictional memo by December 31, 1996, when he agreed on November 15, 1996, to wait for a decision concerning Mr. Hatcher from another entity, the Office of Compliance, before commencing an investigation. This argument lacks merit. Assuming *arguendo* that Mr. James made an agreement with Petitioner not to commence an investigation until the decision was issued, that

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[3] In view of my finding that Petitioner's testimony on this matter lacks credibility and my findings below that her testimony on several other matters lacks credibility, I have concluded that her overall credibility in this case is very weak. See *Blocker v. Department of the Army,* 6 M.S.P.R. 467, 470 (1981) (when witness's testimony discredited on one issue, judge may distrust witness on other issues).

would not constitute a modification of her assignment to submit the jurisdictional memo. Moreover, the record suggests that Mr. James did not make such an agreement. Rather, according to a memo Petitioner wrote to him on November 15, 1996, it appears that he agreed merely to "find out what happened at the hearing" before the Office of Compliance before "making a determination on jurisdiction." Ex. P-92(i). According to Petitioner's memo, she was going to find out what happened at the hearing by asking several attorneys who attended it. *Id.* Petitioner offered no evidence that she was unable to perform that task, and she admitted that she had everything she needed in December 1996 to resolve the jurisdictional issue. Tr. 762. Mr. James testified that during meetings he had with Petitioner after December 11 he "insisted that [she] determine jurisdiction" in the case. Tr. 306. Moreover, it is not credible that the reason Petitioner failed to submit the memo was her inability to find out what had happened at the hearing; she did not offer that reason either to Mr. James during the January 9, 1997, counseling session or to Mr. Clark in her response to the proposal notice.

Mr. James, as Petitioner's supervisor, was authorized to give her instructions concerning her work assignments and was entitled to have those instructions obeyed. Ex. P-10b at 5 (statement in Petitioner's position description that she acts under general supervision of General Counsel). Petitioner clearly did not perform her assignment in the Hatcher case, and the absence of an explanation for her failure to do so shows that her omission was willful and intentional. See *Redfearn v. Department of Labor,* 58 M.S.P.R. 307, 313 (1993). Petitioner's intent to disregard her supervisor's instructions to perform the assignment by the due date he had set is evident from her statement to him that she would do it when she "got around to it." Therefore, her conduct was insubordinate.

PAB Guide To Practice

On September 20, 1996, Nancy McBride, then Chair of PAB, assigned Mr. James the project of revising the PAB Guide to Practice, which is a small twelve-page pamphlet provided to parties who appear before the Board. Exs. PAB-1, Tab 6 at 38, PAB-43. Ms. McBride viewed this as an important project and requested that a draft be submitted by October 17, 1996. Ex. PAB-1, Tab 6 at 38. By memo dated September 25, 1996, Mr. James assigned this project to Petitioner and instructed her to submit a draft to him by October 15, 1996. *Id.* at 37; Tr. 69-70. Petitioner requested and received an extension of time to complete two other assignments so she could focus on the PAB Guide to Practice. Ex. PAB-1, Tab 6 at 39, 40. Although Petitioner understood this project to be her priority assignment, she admitted that she never began working on it. Tr. 752; Ex. PAB-4 at 38-39. Petitioner did not ask Mr. James to extend the due date for this project, Tr. 75, and she did not come to him on that date to explain why she had not begun it, Tr. 72. Subsequently, Mr. James asked Petitioner for such an explanation, and she replied that she had been "overwhelmed" with defending herself against his disciplinary actions and other "attacks," she was recovering from illness brought on by mental and emotional distress caused by his harassment and unwarranted personnel actions, she had been busy working on other projects, and she had been busy responding to numerous memos from him. Ex. PAB-1, Tab 6 at 42.

Petitioner did not present any argument concerning this specification in her prehearing brief or her closing argument. It is clear from the record that her conduct was insubordinate. First, in view of Petitioner's failure to deny any of the allegations concerning this specification in her response to the proposal notice, I draw an inference that those allegations are true. See *Adams,* 735 F.2d at 492. Moreover, as discussed above, Petitioner knew this project was a priority, but she never began working on it, she did not seek an extension of the due date, and she did not come to Mr. James with any explanation. Although Petitioner eventually gave him an explanation after he questioned her, that explanation is not credible. It was untimely given to Mr. James and never given to Mr. Clark. Although Mr. Clark gave her an opportunity to submit evidence of any medical condition that may have contributed to her conduct, she did not do so. Ex. PAB-1, Tab 8 at 74. Also, it is difficult to believe the other matters raised by Petitioner could have prevented her from revising the small pamphlet in question. Therefore, I conclude that Petitioner's failure to complete this assignment was willful and intentional. See *Redfearn,* 58 M.S.P.R. at 313.

Carter Case

On April 16, 1996, Mr. James assigned Petitioner the Carter case and instructed her to investigate the matter and submit a report and recommendation by August 30, 1996. Ex. PAB-1, Tab 6 at 40-41; Tr. 83. When Petitioner did not complete the assignment by that date, Mr. James extended the due date at Petitioner's request to September 30, 1996. *Id.* He again extended the due date at her request to October 25, 1996. *Id.* When she did not complete the assignment by that date, or inform him why it had not been completed, he instructed her on December 11, 1996, to complete it by January 15, 1997.[4] Ex. PAB-1, Tab 6 at 50, 54. However, Petitioner did not submit a report and recommendation on the Carter case by that date. Tr. 83.

On February 21, 1997, Ms. Carter called Mr. James to ask if the report, which he had informed her would be finished by January 31, 1997, had been completed. Ex. PAB-26 at 209. Mr. James apologized for the continued delay and told her he was taking steps to have the report completed by March 31, 1997, *id.*; apparently he had assigned another employee to complete the report. On March 7, 1997, after she had submitted her reply to the proposal notice, Petitioner informed Mr. James that on July 1, 1996, she had received the information she had requested from GAO to begin the investigation; she intimated she had been unable to work on the case because of an August 19, 1996, deadline on another case; she stated she did some work on the case in September but had to stop because of (unspecified) circumstances beyond her control; she noted that the case file reflected he had assumed responsibility for the case; and she asked what her responsibility was at that point. Ex. P-77 (March 7, 1997, memo).

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[4] Petitioner's alleged insubordination regarding the Carter case is limited in the proposal notice to her refusal to comply with the October 25, 1996, and January 15, 1997, due dates. Ex. PAB-1, Tab 1 at 7.

Petitioner did not present any argument concerning this specification in her prehearing brief or her closing argument. It is clear from the record that her conduct was insubordinate. First, in view of Petitioner's failure to deny any of the allegations concerning this specification in her response to the proposal notice, I draw an inference that those allegations are true. See *Adams,* 735 F.2d at 492. Moreover, Petitioner's March 7 memo does not explain specifically why she could not have complied with Mr. James's December 11 instructions to complete the assignment by January 15. Petitioner's statement in that memo that she had to stop working on the assignment in September because of "circumstances beyond her control" is not credible because it is vague and was not contained in her response to the proposal notice. Therefore, I conclude that Petitioner's failure to complete this assignment was willful and intentional. See *Redfearn,* 58 M.S.P.R. at 313.

Petitioner's Other Arguments

Petitioner argues Mr. James improperly proposed her removal before giving her an opportunity to complete the 90-day period he had given her to improve her work performance. This argument lacks merit. Petitioner has cited no authority and I am aware of none that prohibits an official from issuing a notice of proposed removal for misconduct prior to the expiration of a period the employee has been provided to demonstrate satisfactory work performance.

Petitioner also argues that she never refused to do her work, that the record contains evidence that she performed work, that she met with Mr. James every week to keep him abreast of her assignments, and that she was not able to collect all of the evidence to show she was working because Mr. James hurriedly ejected her from her office upon her termination. These arguments also lack merit. The essence of the charge is not that Petitioner refused to do any work or that she failed to keep Mr. James abreast of her assignments. Rather, the essence of the charge is that Petitioner was insubordinate by refusing to comply with Mr. James's instructions to complete the three assignments listed in the specifications within the time limits he had established. The fact that Petitioner did other work does not invalidate that charge. The fact that Petitioner's removal was effected on the same date Mr. Clark issued his decision to remove her may have hindered her ability to obtain evidence to support her case prior to her removal. Ex. PAB 1, Tab 9 at 83, 90. However, she has offered no reason why she could not have sought this evidence during the discovery that was provided in the instant proceeding.

Finally, Petitioner argued that GAO officials improperly influenced her removal, but she offered no evidence to support this argument. Moreover, all of the evidence submitted by GAO on this issue shows that it had no improper role in PAB's decision-making process.

Efficiency Of Service; Penalty

Unquestionably, imposing discipline for insubordination promotes the efficiency of the federal service. *Means v. Department of Labor,* 60 M.S.P.R. 108, 113 (1993). Moreover, in imposing the penalty of removal, it is clear PAB has exercised its managerial judgment properly and within tolerable limits of reasonableness. See *Douglas,* 5 M.S.P.R. at 302. Both the proposal notice and the decision show that Messrs. James and Clark carefully considered appropriate

factors in selecting the penalty of removal. Ex. PAB-1, Tabs 1, 9. Furthermore, as discussed below, the record supports their judgment.

1. Seriousness Of Offenses

Insubordination constitutes serious misconduct. *Thomas v. Department of Defense,* 66 M.S.P.R. 546, 552, *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table). The fact that Petitioner was insubordinate on three occasions makes her misconduct more serious. Also, her refusal to perform her assignments had an adverse effect on the operation of the General Counsel's office, which had only one other attorney to perform the work. Perhaps most important, Petitioner's misconduct adversely affected claimants because the processing of their claims was delayed. Mr. Hatcher called the office several times inquiring about the status of his case, and Mr. James had to take control of the case himself to insure that it moved forward. Tr. 305. As mentioned above, Ms. Carter called Mr. James to ask if the report on her case, which he had informed her would be finished by January 31, 1997, had been completed. When he informed her the report would not be completed until March 31, 1997, she began to cry. Ex. PAB-26 at 209.

2. Past Disciplinary Record

As stated above, Petitioner was disciplined twice in 1996. On October 15, 1996, Mr. James issued Petitioner a letter of reprimand for insubordination, specifically for failing to comply with his instructions to rewrite a document in the Mak case. Ex. PAB 1, Tab 6. On November 18, 1996, the Board suspended her for fourteen days for insubordination, specifically for refusing to comply with Mr. James's instructions to sign a pleading and accompany an employee whom the office was representing to a meeting. *Id.*

As discussed above, my review of Petitioner's past disciplinary record is limited to the issue of whether the actions were clearly erroneous, because I have found that the *Bolling* criteria were met. Review of that issue is limited to the record of any prior proceedings involving the past record; no new evidence or argument, other than Petitioner's reasons for the challenge, can be considered. *Bolling,* 9 M.S.P.R. at 335 & n.3. An action is clearly erroneous only if it leaves the judge with the "definite and firm conviction that a mistake has been committed." *Id.*

Petitioner contends her suspension and reprimand were arbitrary and capricious. She argues regarding the reprimand that Mr. James made it virtually impossible for her to work on the Mak case because he gave her unreasonable deadlines, denied her requests for extensions of time, and prevented her from working overtime and on weekends. Petitioner argues further that the decision to impose the suspension was not based on a preponderance of the evidence, that the only evidence relied on to support the suspension was the self-serving statements of Mr. James, that his testimony was contradictory, that the information relied on by the deciding official was largely irrelevant, and that she effectively rebutted the allegations supporting the suspension. Petitioner also argues that both actions were effected in reprisal for her protected activity. These

assertions do not establish that the reprimand and suspension were clearly erroneous.[5] *Cf. Taylor v. Department of Justice,* 60 M.S.P.R. 686, 690 (1994) (although facts were disputed, and employee claimed that his workload was excessive, that he had not received proper training, and that he had not been apprised of certain regulations, suspension was not clearly erroneous); *Colon v. Department of Veterans Affairs,* 73 M.S.P.R. 659, 665-66 (1997) (employee's dispute regarding merits of prior disciplinary actions were insufficient to invoke MSPB's very limited scope of review).

Upon review of the record concerning the reprimand and suspension, I find that those actions are valid on their face and, to the extent that a record existed, that there was evidence to support them. Consequently, I do not find those disciplinary actions to be clearly erroneous.

In addition, Petitioner was warned specifically by Mr. James in the reprimand and in counseling sessions that her continued insubordination could result in her removal. Ex. PAB-1, Tab 6 at 36; Tr. 84. Thus, there is ample evidence that Petitioner was on notice regarding the unacceptable nature of her conduct and the need to correct that conduct or face removal. However, instead of heeding those warnings, she continued to ignore Mr. James's instructions.

3. Work Record

Petitioner's work record has been mixed. She has 17 years of federal service. She rose from grade GS-2 to grade GS-15. She was nominated by GAO employees to receive the GAO Civil Rights Award in 1993. Ex. P-5. A number of GAO employee organizations petitioned PAB on her behalf not to remove her. Ex. P-6. Petitioner was appointed Acting General Counsel of PAB and served in that role from May to September 1992. Carl Moore, a former PAB General Counsel, testified that Petitioner's performance was mostly exceptional during the eight years he supervised her ending in May 1992. Tr. 17, 22, 26. However, Mr. James found it necessary to withhold Petitioner's within-grade pay increase because of her unsatisfactory performance. Tr. 61; Ex. P-27.

4. Other Factors

Respondent held a high-graded position in which she was required to deal frequently with employees, their representatives, and other parties. Although there is no evidence Petitioner's misconduct resulted in adverse publicity, it had an obvious adverse effect on her ability to perform her duties properly. As indicated above, Respondent committed three offenses of insubordination and had been disciplined twice previously for insubordination. She was warned repeatedly that this conduct was unacceptable and could result in removal. However, her misconduct continued after those warnings, and she has shown no remorse. Therefore, I find

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[5] Petitioner had an opportunity previously to prove her allegation that the suspension was effected in reprisal for her protected activity, but she declined to do so. She filed a petition for review concerning the suspension, but the petition was dismissed because Petitioner failed to prosecute it. Ex. P-13.

that Petitioner has demonstrated no potential for rehabilitation, and that a lesser penalty would not deter similar future misconduct by her and by other employees.

5. Consistency Of Penalties

PAB has acted responsibly and with restraint in this matter. It has utilized progressive discipline and complied with the guidelines in GAO's Table of Penalties. When Petitioner first engaged in insubordination, PAB imposed the minimum penalty authorized by those guidelines -- a reprimand. Ex. PAB-9 at A1-7. When Petitioner repeated that offense, PAB again imposed the minimum penalty authorized by the guidelines -- a 14-day suspension. *Id.* Although removal was authorized for Petitioner's next offense of insubordination, *id.,* PAB did not impose that penalty until she had engaged in three additional offenses of insubordination. There is no evidence PAB imposed less severe discipline on any similarly situated employees.

6. Mitigating Circumstances

There are no mitigating circumstances in this case. Although Petitioner contends Mr. James harassed her, there is no evidence to support this contention; rather, the record shows Mr. James took appropriate actions to deal with Petitioner's misconduct and to improve her performance. Petitioner presented testimony from Howard Johnson, a GAO psychologist, that he counseled her twice in December 1996, and that she was extremely upset, agitated, stressed, and angry concerning problems she was having with her supervisor. Tr. 572-73. However, there is no evidence Petitioner had any medical condition that had any causal connection with her acts of insubordination. As stated above, Mr. Clark gave her an opportunity to submit such evidence to him, but she did not do so. Ex. PAB-1, Tab 8 at 74.

7. Conclusion

Respondent has a fairly long period of federal service -- 17 years -- and has performed very well during much of that period. However, she has engaged repeatedly in serious misconduct, she has a prior disciplinary record, and management has found significant deficiencies in her more recent work performance. Moreover, she held a high-graded position, she has no potential for rehabilitation, and the penalty is consistent with GAO's guidelines. Considering the totality of the offenses and the other *Douglas* factors, PAB's conclusion that Respondent should be removed is well within tolerable limits of reasonableness. *Cf. Redfearn,* 58 M.S.P.R. at 316-17 (removal affirmed under similar circumstances); *Thompson v. United States Postal Service,* 50 M.S.P.R. 41, 46 (1991), *aff'd,* 965 F. 2d 1065 (Fed. Cir. 1992) (Table) (same).

Reprisal

A. 5 U.S.C. § 2302(b)(8)

Petitioner contends PAB violated 5 U.S.C. § 2302(b)(8)[6] by effecting her removal in reprisal for whistleblowing. That provision prohibits the taking of a personnel action "because of ... any disclosure of information by an employee ... which the employee ... reasonably believes evidences" any of the following:

> (i) a violation of any law, rule, or regulation, or
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> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The employee bears the burden of proof initially; if the employee shows by a preponderance of the evidence that a disclosure protected under that section was a contributing factor in the action, the Board must order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same action absent the protected disclosure. *Paul v. Department of Agriculture*, 66 M.S.P.R. 643, 647 (1995).

October 19 Memo

Petitioner contends she made a protected disclosure by sending a memo to the Board on October 19, 1993, accusing Mr. James of various acts of wrongdoing. First, she accused him of failing to protect the rights of GAO employees, and noted that other employees shared her view that he favored GAO management. As an example of his failure to protect employee rights, she alleged that when she was preparing the Marshall case for trial, Mr. James criticized her theories and evidence and told her she was not qualified to present the case; then he declined to file a request for reconsideration of the Board's unfavorable decision. Second, she accused Mr. James of threatening to suspend her for tampering with a Board decision, then removing her title of Deputy General Counsel when she sent a memo to the Board explaining her version of the incident. Third, she accused Mr. James of attempting to detail her to another federal agency to improve her performance -- a detail she felt would not be in the best interest of GAO employees. Fourth, she accused Mr. James of practicing cronyism by hiring two friends. Although noting that those individuals were good employees, she asserted that their loyalty was to Mr. James, and because he had "isolated [her] for attack," they were guarded in their contact with her. Fifth, she accused Mr. James of practicing cronyism in assessing performance. Specifically, she alleged he established a rating period that benefited one of his friends and harmed her, and he failed to rate her "outstanding" in one performance element. Petitioner concluded the memo by stating that those actions, coupled with Mr. James's harassment and abuse, were attempts by him to remove her so he could fill her position with a crony. She asserted that Mr. James would then have complete control over the office and all cases, and the employment rights of GAO employees would be unprotected. Ex. P-1. Petitioner attached to the memo several documents related to its topics. *Id.*

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[6] This provision and 5 U.S.C. § 2302(b)(9), discussed below, apply to GAO employees pursuant to 31 U.S.C. §732(b)(2).

PAB argues that Petitioner's October 19 memo was not a protected disclosure because she did not reasonably believe that the matters described in the letter fell within any of the categories covered by 5 U.S.C. § 2302(b)(8). I agree that Petitioner has failed to meet her burden to prove that she made a protected disclosure by sending the October 19 memo.

At no time prior to or during this proceeding did Petitioner identify any category of wrongdoing under 5 U.S.C. § 2302(b)(8) into which her disclosures allegedly fell. Moreover, the evidence does not reflect that Petitioner reasonably believed that the information she disclosed evidenced any such wrongdoing. The only categories that even arguably apply are gross mismanagement and abuse of Mr. James's authority as General Counsel.

As used in §2302(b)(8), "abuse of authority" means an "arbitrary and capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Sirgo v. Department of Justice,* 66 M.S.P.R. 261, 267 (1995). Gross mismanagement means "a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Nafus v. Department of the Army,* 57 M.S.P.R. 386, 395 (1993). The proper test for determining if Petitioner had a "reasonable belief" that the information she was disclosing evidenced an abuse of authority or gross mismanagement is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by Petitioner could reasonably conclude that Mr. James's actions evidenced an abuse of authority or gross mismanagement. See *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

The evidence does not support a finding that a disinterested observer could reasonably conclude that Mr. James engaged in an arbitrary and capricious exercise of power or in an action creating a substantial risk of significant adverse impact upon PAB's ability to accomplish its mission. A review of Mr. James's actions must begin with the presumption that, as a public officer, he performed his duties correctly, fairly, in good faith, and in accordance with the law and governing regulations. See *id.* (citations omitted).

Mr. James's criticism of Petitioner's performance during the trial phase of the Marshall case appears to have been based on legitimate concerns because the Board initially ruled against Mr. Marshall. After expressing dissatisfaction with the quality of two petitions for reconsideration of that decision that Petitioner had drafted, Mr. James declined to request reconsideration but gave Mr. Marshall a brief drafted by Petitioner for his use in filing a petition for reconsideration on his own behalf. Ex. P-1, Att. 1,3; Tr. 590-91. The Board then reversed its decision and ruled in favor of Mr. Marshall, Tr. 591, but its decision was not based on arguments raised in the brief drafted by the Petitioner, see *Marshall v. GAO,* 2 PAB 270, 329 (1993).

Mr. James's decision not to request reconsideration did not constitute an abuse of authority because, despite that decision, Mr. Marshall won his case, and therefore Mr. James's decision did not adversely affect Mr. Marshall's rights. See *Sirgo,* 66 M.S.P.R. at 267. In any event, there is little evidence to support Petitioner's belief that Mr. James failed to protect the rights of Mr. Marshall or other GAO employees and thereby abused his authority. As General Counsel,

Mr. James had overall responsibility for deciding whether to pursue cases on behalf of employees; as a prosecutor, he had wide discretion in making those decisions. The fact that an adjudicatory body like the Board disagreed with Mr. James's view concerning the merit of Mr. Marshall's case does not establish that his view was arbitrary or capricious, especially since two of the five Board members issued dissenting opinions. *Marshall,* 2 PAB at 270.

Petitioner's belief was supported by the views of certain other GAO employees that Mr. James had neglected to prosecute their cases and by the fact that he had declined to prosecute 46 of 54 cases. Ex. P-6, P-39, P-42, P-44 thru 46, P-82; Tr. 685. However, the subjective views of Petitioner and those employees are insufficient to support a finding that her belief was reasonable. See *White*, 174 F.3d at 1381. Although Petitioner pointed out that the Board believed Mr. James was "a little too conservative" in deciding whether to prosecute cases, Mr. Clark attributed this belief solely to a "difference in perspective." Tr. 341. He testified he did not believe Mr. James had engaged in misconduct or abused his authority in this regard. Tr. 342. Rather, Mr. Clark believed Mr. James acted in good faith in performing his duties. *Id.*

Petitioner's assertion that Mr. James failed to protect the rights of GAO employees, coupled with her assertion that Mr. James wanted to remove her so he could have complete control over all cases to the detriment of GAO employees, strongly suggests that Petitioner's memo was motivated by her disagreement with Mr. James's prosecutorial philosophy. However, the Whistleblower Protection Act is not a weapon to be used in arguments over office policy. *White,* 174 F.3d at 1381.

MSPB's decision in *Carolyn v. Department of the Interior,* 63 M.S.P.R. 684, 687, 690-91, *review dismissed*, 43 F.3d 1485 (Fed. Cir. 1994) (Table), is apropos. In *Carolyn,* an employee expressed disagreement with the decision of his supervisor, as trustee for certain tribal funds, not to make certain investments. The employee believed the supervisor was abrogating his fiduciary duty to the tribes by denying them the right to maximize their returns. However, MSPB found no reasonable belief of an abuse of authority. It reasoned that the asserted financial disadvantage to the tribes was due solely to the particular investment preference of the supervisor, who had expertise in the matter and overall responsibility for making such decisions. Similarly, in the present case, it is apparent that Mr. James, who was formerly a Board member and the Assistant Special Counsel for Prosecution at the Office of Special Counsel of MSPB, Tr. 54, had expertise in the litigation of employee personnel matters. In the absence of any persuasive evidence that Mr. James's actions were improper, his decisions not to prosecute certain cases constitute judgments based on his expertise and preference. A reasonable person would not view those decisions as abuses of authority.

The other matters at issue -- Mr. James's alleged actions of criticizing Petitioner's performance, threatening to suspend her, removing her title, attempting to detail her, hiring friends, and assessing her performance unfairly -- are matters related to Mr. James's management of the office. There is no evidence that those actions, even if taken in their entirety, would create a substantial risk of significant adverse impact upon PAB's ability to accomplish its mission. There is no evidence the General Counsel's office would not have been able to function while Petitioner went on the proposed detail; although there were only a few employees in that office,

an employee from another agency would have replaced Petitioner during her detail. Ex. P-1, Attachment 7. Although the practice of cronyism in hiring and appraising performance could create such a risk if the employees in question were not competent, there was no evidence to that effect. In fact, Petitioner asserted in her memo that they were good employees. Consequently, I find no reasonable belief that Mr. James engaged in gross mismanagement.

Similarly, I find no reasonable belief that Mr. James abused his authority regarding those matters because there is no evidence that he acted arbitrarily or capriciously regarding them, or that his actions adversely affected any rights of the Petitioner.

Finally, Petitioner's self-interest in sending the memo to the Board must be considered in determining whether she had a reasonable belief that Mr. James had engaged in wrongdoing. See *White,* 174 F.3d at 1381. The memo states that Mr. James threatened to suspend Petitioner and wanted to remove her. Moreover, many of the attachments to the memo reflect that Mr. James had recently informed Petitioner that he was not pleased with her performance. Ex. P-1, Attachments 1, 2, 7, 8. Thus, Petitioner had reason to believe that she could be subjected to disciplinary action, and she had a motive to avoid such action by accusing Mr. James of wrongdoing concerning this matter. Given the lack of strong evidence that Mr. James abused his authority or engaged in gross mismanagement, it is likely that Petitioner's self-interest was a motivation for her memo. *Cf. White*, 174 F.3d at 1381 (Whistleblower Protection Act is not a shield for insubordinate conduct).

September 25 Letter

Petitioner also contends she made a protected disclosure by sending a letter dated September 25, 1996, to Judge Harriet Davidson, a Board member, complaining about Mr. James's handling of the case of an employee who had a history of psychiatric problems. Petitioner had been assigned to investigate the case, draft a report and recommendation, and draft a petition for review to be filed with the Board. Meanwhile, the employee expressed a desire to settle the case, so Mr. James engaged in settlement negotiations with GAO while Petitioner continued to work on her assignment. After she completed the assignment, Mr. James reviewed it and made changes in the draft petition for review because he disagreed with her theory of the case. He then told her a settlement agreement had been reached with GAO, but until the settlement was finalized, a petition for review had to be filed. After discussing her theory of the case, Mr. James instructed her to sign the revised petition for review and accompany the employee to a meeting related to the agreement. Tr. 89-100. On August 16, 1996, Petitioner wrote a memo to Mr. James stating she refused to follow those instructions. Ex. PAB-2, Tab 5 at 90. She explained in the memo that Mr. James should have given the employee the report on the investigation, which she felt contained "reasonable evidence to believe that the agency had committed a prohibited personnel practice," before the employee agreed to settle the case; the agreement did not provide the employee with anything of substance; and the revised petition contained errors and an untenable legal theory. *Id.* Mr. James accompanied the employee to the meeting, filed the revised petition for review, and eventually filed a motion to dismiss the case based on the settlement agreement.

On September 25, 1996, Judge Davidson conducted a settlement conference on the motion; Petitioner was in attendance. The judge questioned the employee on her understanding of the agreement and its consequences, and provided her an opportunity to ask questions. Judge Davidson concluded the conference by stating the employee seemed to understand the agreement, and stating, "I'm going to grant the motion to dismiss." Ex. PAB-16.

Later on September 25, Petitioner wrote a letter to Judge Davidson asserting a "great injustice" was done to the employee at the conference, and she (Judge Davidson) was "unwittingly a part of it." The letter asserted that although she told Mr. James there were "more than reasonable grounds" to believe the employee had been illegally targeted for a reduction in force, he removed her from the case and pursued a settlement that was an "empty one" for the employee. The letter asserted further that the employee was denied her right to a hearing on the pretext of a settlement agreement that was not in writing and that was being monitored by the person (Mr. James) who "refused to bring her meritorious case before the Board." Petitioner also asserted in the letter that the employee was one of many whose rights had been violated and whose lives had been destroyed by Mr. James and PAB. Ex. PAB-17.

PAB argues that Petitioner's September 25 letter was not a protected disclosure because she did not reasonably believe that the matters described in the letter fell within any of the categories covered by 5 U.S.C. § 2302(b)(8). I agree that Petitioner has failed to meet her burden to prove that she made a protected disclosure by sending the September 25 letter.

Petitioner did not allege at any time prior to or during this proceeding that her letter disclosed matters that fell within any of the categories covered by 5 U.S.C. § 2302(b)(8). Moreover, the evidence does not reflect that Petitioner reasonably believed that she had disclosed any such matters. Petitioner has identified no law, rule, or regulation that Mr. James violated, and none is apparent. Similarly, there is no evidence of gross mismanagement, gross waste of funds, or a danger to public health or safety.

The only category that even arguably applies is abuse of Mr. James's authority as General Counsel. However, the evidence does not support a finding that a disinterested observer could reasonably conclude that Mr. James engaged in an arbitrary and capricious exercise of power or that the rights of the employee were adversely affected. As discussed above, review of Mr. James's actions must begin with the presumption that, as a public officer, he performed his duties correctly, fairly, in good faith, and in accordance with the law and governing regulations. See *White*, 174 F.3d at 1381 (citations omitted).

MSPB's decision in *Carolyn,* discussed above, is again apropos. As discussed above, Mr. James had expertise in the matter and had overall responsibility for selecting the strategies to be used in cases. The asserted disadvantage to the employee was due solely to Mr. James's preference for considering settlement instead of focusing solely on litigation. Moreover, it is clear that Mr. James made the employee aware of her options and acted in accordance with her desires. Ex. PAB-23. Although Petitioner testified Mr. James withheld the investigative report, which would have informed the employee she had a strong case, Tr. 655, Petitioner later admitted he issued that report more than a month before Judge Davidson's settlement conference, Tr. 738.

Petitioner also admitted she did not review the case file prior to sending the September 25 letter to insure that her allegations were true. Tr. 742. The employee explained at that conference that although she believed she had received unjust punishment in the past, she chose settlement because she had had some recent problems and she did not want to go "back that far" and "try to dig things up out of the past." Ex. PAB-16, Tr. at 7-8. Even if Petitioner was correct in her pretrial assessment of the merit of the employee's case, that would not show that Mr. James's action of pursuing settlement was arbitrary or capricious. Because there are risks involved in litigating cases, meritorious ones can sometimes be lost. Moreover, as was the case here, clients sometimes have other considerations that cause them to choose to settle cases they believe are meritorious.

Petitioner offered no credible evidence to show that, because of the employee's history of psychiatric problems, the employee was unable to comprehend the situation or make rational decisions. Petitioner testified Mr. James perpetrated a "fraud" on this "mentally disabled" employee by persuading her to settle the case. Tr. 656. However, this testimony lacks credibility because it is contradicted by a memo written by Petitioner on August 9, 1996, describing a meeting attended by her, Mr. James, and the employee; the memo states that the employee was lucid, that Mr. James explained her options to proceed with litigation or pursue settlement, and that the employee stated she wanted his office to represent her in settlement discussions. Ex. PAB-23.

Moreover, the employee's history was known to Judge Davidson, who was satisfied that the employee understood the settlement agreement and its consequences. A review of the transcript of the settlement conference supports that conclusion. The employee's statements during the conference were logical and reflected a full understanding of the agreement. Further, after Judge Davidson received the September 25 letter, she recused herself from further participation in the case. Another PAB judge, after considering whether the employee's mental impairment affected her ability to enter into the settlement agreement, dismissed the case as settled. Ex. PAB-16.

Finally, the record shows that Petitioner had a personal reason for sending the letter. The month before the one in which she sent the letter, Petitioner had refused in writing to follow Mr. James's instructions to sign the revised petition for review and to accompany the employee to a meeting. Previously, Mr. James had warned Petitioner in writing that if she engaged in conduct contrary to his instructions, he would take appropriate action. Ex. PAB-2, Tab 5 at 116. Thus, Petitioner had reason to believe that she could be subjected to disciplinary action, and she had a motive to avoid such action by accusing Mr. James of wrongdoing concerning this matter.[7] Given the total lack of evidence that Mr. James abused his authority, it is likely that Petitioner's self-interest was the only factor that motivated her to send the letter. See *White*, 174 F.3d at 1381 (Whistleblower Protection Act is not a shield for insubordinate conduct).

Conclusion

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[7] On September 27, 1996, Mr. James proposed to suspend Petitioner for 14 days because of her refusal follow those instructions, and the Board later effected the suspension. Ex. PAB-2.

Petitioner has not shown that she engaged in any protected disclosures. Consequently, there is no need to consider any other issues related to the alleged violation of §2302(b)(8).[8] However, assuming arguendo that Petitioner made one or more protected disclosures, I would find, for the reasons set forth in detail in Respondent's prehearing brief and closing argument, that any such disclosure was not a contributing factor in her removal; in sum, well before Petitioner made her disclosures, Mr. James expressed concerns to her about her performance and conduct and warned her that he would take action to correct any conduct contrary to his instructions. In addition, there is clear and convincing evidence that PAB would have effected the removal if the disclosures had not been made. As discussed above, PAB's charges of insubordination were well supported by the evidence and were largely uncontested; and the penalty of removal was firmly supported by Petitioner's prior disciplinary record and many other factors.

B. 5 U.S.C. §2302(b)(9)

Petitioner contends PAB violated 5 U.S.C. § 2302(b)(9) by effecting her removal in reprisal for her action of filing various appeals; that provision prohibits the taking of a personnel action "because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation ...."[9] Resolution of this issue is governed by *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986). See *Mack v. United States Postal Service*, 48 M.S.P.R. 617,

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[8] As discussed above, I dismissed the petition for review as it concerned nine additional actions that Petitioner claimed were effected in reprisal for whistleblowing. However, I ruled during a prehearing conference that I would consider evidence concerning those actions relevant to Petitioner's contention that they were part of a pattern of reprisal culminating in her removal. Case File, Tab 56. Evidence that those actions were motivated by reprisal for whistleblowing might have supported Petitioner's claim that her October 19 and September 25 disclosures contributed to her removal. However, because Petitioner did not show that those disclosures were protected, there is no need to consider the contributing factor issue, and thus no need to review the evidence concerning the nine actions. Similarly, there is no need to consider Petitioner's argument that Mr. James's issuance of an unacceptable performance appraisal after she was removed constitutes evidence of reprisal. In any event, as discussed below, there is clear and convincing evidence that PAB would have effected Petitioner's removal absent any disclosures.

[9] Petitioner argues in her Closing Statement that PAB also violated §2303(b)(9) by removing her in reprisal for assisting an employee in the exercise of a lawful appeal right. The actions prohibited by that provision include the taking of a personnel action because of an employee's providing lawful assistance to any individual in the exercise of any appeal, complaint, or grievance right. However, I have not considered this issue because it was not raised in a timely manner. The issue was not raised in Petitioner's petition for review as required by PAB regulations. See 4 C.F.R. § 28.18(d) (petition must include reasons for believing action to be improper). Nor was it raised in her prehearing brief, despite my order that such briefs must set forth the issues. Case File, Tab 17. Because the other parties did not learn of this issue until after the hearing, and thus had no opportunity to present evidence concerning the issue, it would not be in the interest of justice for me to consider it. See 4 C.F.R. §28.18(e) (failure to raise a defense in petition may bar its later submission if rights of other parties would be prejudiced); *id.*, §28.21(a) (amendments to petitions may be disallowed if parties did not have adequate notice to prepare for the new allegations).

621 (1991), *review reinstated and case transferred to district court*, 36 F.3d 1113 (Fed. Cir. 1994) (Table), *dismissed*, No. 92-CV-0068 (FB), 1998 WL 546624 (E.D. N.Y. Aug. 26, 1998), *aff'd*, 181 F.3d 83 (2d Cir. N.Y. 1999), *cert. denied*, 1999 WL 624570 (U.S. Oct. 4, 1999) (No. 99-5682).

Under *Warren,* Petitioner has the burden of showing that she exercised appeal rights granted by a law, rule, or regulation, that the accused official knew of the appeals, that her removal could have been retaliation under the circumstances, and that there was a genuine nexus between her appeals and her removal. It is undisputed that Petitioner met the first three elements of her burden of proof. Nine of the appeals in question were charges filed with PAB alleging that she had been subjected to prohibited personnel practices while employed at PAB. Ex. P-9. One appeal was a petition for review she filed concerning the first two charges. Ex. P-9, Tab 12. The final appeal was an appeal to the U.S. Court of Appeals for the Federal Circuit from the decision concerning that petition for review. *Id.* The charges and petitions for administrative and judicial review were filed and processed pursuant to applicable law and regulations, and Mr. James issued memos forwarding the charges for processing. Except for the memo concerning the first charge, copies of those memos were sent to Mr. Clark. *Id.* Given the positions of Messrs. James and Clark, their involvement in the matters at issue, and the fact that they were named as respondents in the petition for administrative review, Case File for PAB Docket No. 95-03, Tab 1b, it is reasonable to believe they were aware of both petitions for review. The charges and petitions for review were all filed prior to Petitioner's removal.

However, Petitioner has not shown that there was a genuine nexus between her appeals and her removal. Petitioner filed the following charges alleging that she had been subjected to prohibited personnel practices. On January 4, 1994, she filed a charge contesting a ten-day suspension imposed by PAB for insubordination. *Id.*, Tab 1. On November 3, 1994, she filed a charge contesting Mr. James's mid-year appraisal of her performance for the period January 1994 through June 1994; Mr. James had rated her performance unacceptable on the element requiring her to meet deadlines. *Id.*, Tab 2. On November 27, 1995, she filed a charge contesting her October 1995 annual performance rating, on which Mr. James had criticized her performance and rated it as "Fully Successful." *Id.*, Tab 3. On January 3, 1996, she filed a charge contesting a formal notice of unacceptable performance issued by Mr. James in December 1995. *Id.*, Tab 4. On October 15, 1996, she filed a charge contesting a notice of a proposed fourteen-day suspension for insubordination issued by Mr. James in September 1996. *Id.*, Tab 5. On November 18, 1996, she filed a charge contesting a fourteen-day suspension imposed by the Board on November 15, 1996, in response to Mr. James's proposal. *Id.*, Tab 6. On December 5, 1996, she filed a charge contesting an October 15, 1996, letter of reprimand; the denial of her within-grade pay increase, effective November 24, 1996; a November 12, 1996, letter of reprimand; the aforementioned fourteen-day suspension; and the aforementioned notice of unacceptable performance. *Id.*, Tab 7. On January 10, 1997, she filed a charge contesting a December 11, 1996, notice that she was being provided an opportunity to demonstrate acceptable performance; an unacceptable performance appraisal issued October 31, 1996; and the aforementioned letters of reprimand, denial of within-grade increase, and fourteen-day suspension. *Id.*, Tab 8. On January 21, 1997, she filed a charge contesting the January 14, 1997, notice of proposed removal issued by Mr. James. *Id.*, Tab 9.

Messrs. James and Clark did not have strong reasons to retaliate against Petitioner for filing the appeals. Petitioner accused Mr. James of wrongdoing in most of the charges, and she accused Mr. Clark of wrongdoing in the charge concerning imposition of the fourteen-day suspension. However, there is no evidence any of the charges or petitions for review were found to have merit by any person who investigated or adjudicated them. Nor is there any evidence Mr. James or Mr. Clark suffered any adverse consequences as a result of the charges or petitions for review.

Petitioner argues that, as a result of her charges, Mr. James had to expunge several actions that were bases for them. Petitioner is essentially correct in that regard. As stated above, two of her charges -- the January 1994 charge concerning her ten-day suspension and the November 1994 charge concerning her 1994 mid-year performance appraisal -- ultimately became the bases for a petition for review. During the pendency of that proceeding, PAB rescinded both actions and moved to dismiss the case as moot. Ex. P-9, Tab 12. At the same time, Mr. James rescinded the action that was the basis for Petitioner's November 1995 charge -- her October 1995 annual performance rating. Ex. P-15c. The motion to dismiss was granted over Petitioner's objection, and her petition for judicial review of that decision resulted in its affirmance. Ex. P-9, Tab 12.

However, the ostensible basis for the rescission of those actions was PAB's desire to resolve the matters without adversarial proceedings and to put past differences aside in an effort to focus on the work of PAB. Exs. P-14c, -15c. There is no evidence to the contrary. No decision on the merits had been issued at the time of the rescission, and no hearing on the merits had been even held at that time. Ex. P-9, Tab 12. Thus, the rescission of those actions was voluntary, and it was unlikely to have created a strong motivation for Mr. James or Mr. Clark to take reprisals against Petitioner.

Further, there is strong evidence that the actions of Messrs. James and Clark were properly motivated by valid managerial considerations. Mr. James informed Petitioner in writing in February 1993 -- nearly one year before she filed her first appeal -- that if she embarked on a course of conduct contrary to his instructions, he would take the most appropriate action to correct that conduct. Ex. PAB-2, Tab 5 at 116. Petitioner, herself, stated that on October 14, 1993, nearly three months before she filed her first appeal, Mr. James threatened to suspend her for tampering with a Board decision, Ex. PAB-14 at 14; and that on October 22, 1993, he issued her a notice of proposed removal based partly on the alleged tampering, *id.* at 17. That proposal resulted in the ten-day suspension that was the subject of Petitioner's first appeal. *Id.* at 17. This evidence makes it clear that well before Petitioner's first appeal, Mr. James had threatened to take action to correct misconduct on her part, and had demonstrated his willingness to implement that threat. Thus, it is highly likely that Mr. James's reprimand, proposed fourteen-day suspension, and proposed removal of Petitioner were motivated by his continued desire to correct her misconduct, not by Petitioner's appeals.

Finally, as discussed above, PAB's charges of insubordination in support of Petitioner's removal were well supported by the evidence, and were largely uncontested; and the penalty of removal was firmly supported by Petitioner's prior disciplinary record and many other factors. Thus, it is highly likely that Mr. James's decision to propose Petitioner's removal and Mr. Clark's decision

to effect it were based on the reasons stated in the proposal and the decision, regardless of her appeals.

CONCLUSION

Petitioner's removal is **SUSTAINED.**